88-2005

Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

# In the Supreme Court of the United States

October Term, 1989

RAMON RIVERA, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief For Petitioner

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## QUESTIONS PRESENTED

1. Is it permissable to convict a criminal defendant on the basis of alternate theories presented to the jury when one of those theories is unconstitutional?

2. May a federal court convict a defendant on an offense not charged in the indictment?

3. May a violation of the Fifth Amendment's indictment clause ever be harmless error?

4. May a federal court impose a second tier harmless error analysis upon defendants trying to assert plain error?

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1989

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Ramon Rivera, Petitioner,

v.

United States of America, Respondent.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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The Petitioner Ramon Rivera respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on April 10, 1989.

## OPINION BELOW

The opinion of the Court of Appeals for the First Circuit has not been reported. It is attached in the appendix hereto, p. A-1, infra.

The judgment of the United States District Court for the District of Massachusetts is attached in the appendix hereto, p. A-22, infra.

## JURISDICTION

Invoking federal jurisdiction under 18 U.S.C. § 3231, the United States of America, respondent, instituted criminal proceedings against Ramon Rivera, petitioner, in the District of Massachusetts. On March 31, 1988, judgment was entered by the District of Massachusetts finding Ramon Rivera guilty on three counts of federal drug law violations.

On Ramon Rivera's appeal as of right pursuant to 28 U.S.C. § 1291, the First Circuit on April 10, 1989, entered a

judgment and an opinion reversing Ramon Rivera's conviction on one of the three counts. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

As a result of an undercover drug operation, Ramon Rivera was tried on three counts of a four count indictment. Count one alleged conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846. Count three alleged distribution of cocaine on February 11, 1987, and Count four alleged distribution of cocaine in excess of 500 grams on March 30, 1987, each in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (aiding and abetting). Count two of the indictment

applied only to Azulay, a separately tried co-defendant.

The February 11, 1987 Undercover Operation

The undercover operation began February 11, 1987, when Drug Enforcement Agents Alexander and Assarian and government informant Miller met with Azulay, a drug-dealer, at J. C. Hillary's restaurant in Dedham, Massachusetts to negotiate the purchase of a "sample" pound of cocaine for $17,000. 2d Tr. 1 53.

To arrange delivery, informant Miller and Agent Alexander went with Azulay to his house. 2d Tr. 1 74. Inside the house was Chutjian, Azulay's source of cocaine supply. Alexander gave the $17,000 to informant Miller, who paid Chutjian. 2d Tr. 1 74. Chutjian then placed a phone call "to make arrangements to pick up the dope." 2d Tr. 2 34. Soon afterwards informant Miller, Azulay and Chutjian left the house and agreed that agent Alexander

could follow Chutjian and Miller, in Miller's truck, to the place of delivery. 2d Tr. 1 74.

The Delivery At The "Ground Round" Restaurant

The delivery took place at the parking lot of the "Ground Round" restaurant in Walpole, Massachusetts. 2d Tr. 1 75. Chutjian parked his red Mustang at which point agent Alexander pulled up alongside the Mustang's passenger door, 2d Tr. 1 76, and handed informant Miller the money through the window. 2d Tr. 1 76. Eventually someone parked a blue car next to the Mustang, and a person who the DEA agent's report identified as a "white male" got out of the passenger's side and climbed into the back seat of the Mustang on the driver's side. 2d Tr. 1 78. The "white male" passed an envelope containing cocaine to Chutjian, who gave the money to "the other person." 2d Tr. 2 40. At trial, both agent Alexander and informant Miller

testified that the "white male" was Ramon Rivera, even though Mr. Rivera is Hispanic.

The Identification Of Mr. Rivera As The "White Male"

Despite the presence of a Drug Enforcement Agent and government informant, no pictures were taken, and neither the agent nor informant gave a positive identification of Mr. Rivera as the "white male". 2d Tr. 1 93. Indeed, in a contemporaneous report, agent Alexander failed to mention any details about the "white male's" appearance, such as his size, clothing or facial features.[1] 2d Tr. 1 90-93.

Another witness testified that Mr. Rivera's roommate had rented a blue car with a certain license plate number on February 11, 1987. 2d Tr. 2 73-74. According to a Drug Enforcement Agent, the

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[1] Notwithstanding her vague report, Special Agent Alexander identified Mr. Rivera at trial as the "white male." 2d Tr. 1 78, 1 80.

blue car in the parking lot of the Ground Round had the same license number. Mr. Rivera testified that he was in New York City at a Co-op housing project on February 11, 2d Tr. 3 23-24, and not in the blue car at the Ground Round Restaurant, 2d Tr. 3 24-25, although Mr. Rivera's supervisor at Co-op City testified that he had not seen Mr. Rivera in New York on February 11.

The March 30, 1987 Undercover Operation

The second undercover cocaine deal occurred on March 30, 1987, when Chutjian offered to sell agent Assarian two kilograms of cocaine. 2d Tr. 2 84. Chutjian and agent Assarian agreed to consummate the deal at J. C. Hillary's Restaurant in Dedham, Massachusetts. 2d Tr. 2 84. Agents Assarian and Alexander met Chutjian at the restaurant and then they all drove to Azulay's house. 2d Tr. 2 86. Upon arrival, Chutjian entered the house and came back with a bag which he then turned

over to agent Assarian. 2d Tr. 2 86. Assarian looked inside the bag and saw two bundles filled with white powder, 2d Tr. 2 86-87, at which point Chutjian was arrested. 2d Tr. 2 87.

After Chutjian's arrest, agent Assarian asked to meet Chutjian's source of supply. 2d Tr. 2 92. Chutjian made some phone calls during which Assarian overheard him asking "Manny,[2] where is Freddie? The deal went through, everything is fine." 2d Tr. 2 92; 2d Tr. 2 96. During another phone call, Chutjian made arrangements to meet someone at the Hong Kong Restaurant in Plainville, Massachusetts. Before Chutjian hung up, he said "Manny, bring a piece for me." 2d Tr. 2 97.

Meeting At The Hong Kong Restaurant

Agent Assarian, agent Alexander and Chutjian all proceeded to the Hong Kong

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[2] "Manny" is Mr. Rivera's nickname.

Restaurant. Assarian testified that Mr. Rivera joined them at the restaurant and when Assarian complained to him about the poor quality of the cocaine purchased on February 11, Mr. Rivera responded, "Well, you're happy with the two you just got, aren't you?" 2d Tr. 2 100. Assarian also testified that Mr. Rivera wanted to be paid for the cocaine delivered by Chutjian. 2d Tr. 2 108-109. Mr. Rivera was then arrested at the Hong Kong Restaurant.

The First Trial

Mr. Rivera's first trial began on June 23, 1987. On the first day of deliberations the jury returned a guilty verdict on counts one and four but was unable to reach a verdict on count three. The jury offered to return the next day to continue deliberations, 1st Tr. 5 98, at which point the court asked the government whether it would be willing to drop count three if guilty verdicts were returned on the other

two counts. The Court and prosecutor decided to accept the jury's guilty verdicts on counts one and four, the conspiracy count and the count charging distribution in excess of 500 grams on March 30, and to "forget... about the rest of the case." 1st Tr. 5 102.

The Invalid Indictment

Subsequently, the prosecutor informed Mr. Rivera's counsel that the indictments had been returned by a grand jury whose term had expired and thus were invalid. The prosecutor then gave Mr. Rivera the option of either staying in prison on a conviction founded on an infirm indictment or requesting that his convictions be vacated. At Mr. Rivera's request, the convictions were vacated.

## The New Indictment

On December 17, 1987, a new grand jury re-indicted Mr. Rivera on three counts identical to those in the first indictment. Count three, charging distribution of cocaine on February 11, was renumbered as count two. Count four, alleging distribution of cocaine in excess of 500 grams on March 30, was renumbered as count three.[3] Count one, the conspiracy charge, remained the same, except to add a co-defendant.

## The Second Trial

### The Erroneous Jury Instruction

Trial on the new indictment began on March 14, 1988. At the conclusion of the testimony, the trial judge incorrectly charged the jury that it could return a guilty verdict on the February 11 and March

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[3] The remainder of this petition will refer to the February 11 and March 30 claims as counts two and three respectively.

30 distribution charges if they found that Mr. Rivera possessed cocaine with intent to distribute it. 2d Tr. 4 61, 63. Needless to say, the indictment on both counts charged distribution, not possession with intent to distribute. The jury then returned guilty verdicts on all three counts.

The First Circuit's Decision

The First Circuit affirmed Mr. Rivera's conviction on the March 30 claim, in spite of the trial judge's erroneous instructions. The Court agreed that the trial judge "incorrectly described the indictment, [as charging] `possessing cocaine with intent to distribute,' rather than the distribution itself," United States v. Ramon Rivera, No. 1398 (1st Cir. April 10, 1989) slip op. at 8, and that standing alone such an erroneous jury charge constitutes plain error.

The First Circuit Overturned The Conviction On the February 11 Claim

On appeal, the First Circuit correctly found that double jeopardy barred retrial of the February 11 claim and that Mr. Rivera did not waive the defense of double jeopardy by not pleading it. The Court held that the plain error doctrine was applicable, and reversed the conviction on the February 11 claim.

The First Circuit Affirmed The Conviction On The March 30 Claim

The First Circuit wrongly concluded that the trial judge's subsequent response to a jury question seeking clarification on the February 11 claim rendered the error on the March 30 claim "harmless". The jury sought clarification as to whether it had to find Mr. Rivera present during the events of February 11. Slip op. at 8. In response, the Court repeated that Mr. Rivera was charged with possession with intent to distribute. The Court then gave

further instructions on the aiding and abetting charge in connection with the February 11 events, stating that, whether present or not, the jury must find that Mr. Rivera participated in the distribution. Slip op. at 8.

> The Government's theory was that he was the person, and the evidence that the Government put forward, it argued, suggests to you that he was the person who appeared at the Ground Round on February 11th and transferred a package to either Mr. Miller or Mr. Chutjian, I can't remember which, and that that package contained cocaine, and that that was the same package that is now upstairs in the jury room. That was the Government's theory.
>
> What the Government, as I say, has to prove is that he participated in the distribution of cocaine on that day.
>
> The Government also suggested to you, although, this was its primary theory that he was there, that he acknowledged participating in the distribution of cocaine on that day as well as on the 30th, in the conversations at the Hong Kong Restaurant on March 30.
>
> Whether he did or not is for you to find. I think the evi-

dence is thin of the conversations that would suggest that he distributed. But you will have to determine whether he, if you find that he wasn't there, whether he, in fact, participated in the distribution of cocaine on February 11th.

If you find that he did participate in the distribution of cocaine, knowingly and intentionally, then you may find him guilty of Count 2.

How was the jury to understand that the trial judge's clarification on the February 11 claim actually applied to the March 30 claim? These claims alleged distribution on two different days. Whether or not Mr. Rivera was present on the February 11 claim (count two) is irrelevant to his alleged participation in the March 30 distribution. Nevertheless, the First Circuit found that the trial judge's "clarifying" instructions on the February 11 claim rendered the plain error on the March 30 claim harmless.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW, WHICH PERMITTED MR. RIVERA'S CONVICTION ON ONE OF TWO ALTERNATE THEORIES WHEN ONE OF THOSE THEORIES WAS UNCONSTITUTIONAL, CONFLICTS WITH DECISIONS OF THIS COURT

The jury was presented with two theories upon which to convict Mr. Rivera on the March 30 claim (count three): (1) possession with intent to distribute, as the trial judge erroneously instructed the jury in her discussion of the March 30 distribution claim (count three); and (2) distribution of cocaine, as the trial judge described in her "clarification" of the entirely different February 11 claim (count two).

In Timothy Leary v. United States, 395 U.S. 6 (1969), this Court held that "when a case is submitted to the jury on alternate theories the unconstitutionality of any of the theories requires that the conviction be set aside." In Leary, the trial court had instructed the jury

that they could convict defendant of violating federal marijuana trafficking laws on either of two alternative theories. Even though defendant's testimony may have supplied all the evidence necessary for a valid conviction under the first theory, the fact that the jury could have convicted on the basis of a second unconstitutional theory rendered the conviction invalid.

Similarly, Francis v. Franklin, 471 U.S. 307 (1985), held that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside.

In this case, the jury may well have convicted Mr. Rivera on a theory under which he could not constitutionally be convicted. The trial judge incorrectly instructed the jury that it could convict Mr. Rivera on the March 30 claim (count three) for possession with intent to dis-

tribute even though the indictment on the events of March 30 charged distribution. See United States v. Ramon Rivera, No. 88-1398 (1st Cir. April 10, 1989) slip. op. at 8. A conviction based on a jury charge that omits a material defining element of the offense violates the Due Process Clause of the Constitution.[4]

The Appeals Court concluded, however, that the trial judge's subsequent response to a jury's question seeking clar-

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[4] In Dunn v. United States, 442 U.S. 100, 106 (1979), this Court declared that a conviction on a charge neither alleged in the indictment nor presented to the jury at trial offends "the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." See also Garner v. Louisiana, 368 U.S. 157 (1961) (conviction for offense that was never charged constitutes denial of due process); Potts v. Zant, 734 F.2d 526 (11th Cir. 1984) (failure of trial judge to adequately define the offense charged and its elements deprived the defendant of due process); United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980) (due process requires that a person be tried and convicted only for specific offenses for which he is charged).

ification on a different claim (count two relating to the events of the February 11 claim) provided an acceptable alternate basis for Mr. Rivera's conviction on the claim relating to the March 30 distribution claim, as to which there was no clarifying instruction.

With respect to count two, the jury was confused as to whether it had to find Mr. Rivera present during the February 11 distribution in order to return a guilty verdict on that count. In response, the trial judge repeated that Mr. Rivera was charged with possession with intent to distribute and then stated that, whether Mr. Rivera was present or not, the jury must find that he "participated in" the distribution on February 11 (count two). The trial judge noted that evidence of Mr. Rivera's distribution on March 30 (count three) was weak.

The trial judge never explained that her language on distribution given to clarify the February 11 claim (count two) also applied to the entirely different March 30 claim (count three), as to which the jury had requested no clarification. Thus, Mr. Rivera was in all probability convicted on the March 30 claim (count three) based upon the trial judge's pre-existing instruction that omitted the critical element of distribution.

Even if the jury, in deliberating about the March 30 claim, did consider the trial judge's "clarifying" reference to "participating in" distribution with respect to the events of February 11 (count two), Mr. Rivera may have been and, indeed, probably was convicted unconstitutionally on the basis of the erroneous jury charge. That possibility alone mandates reversal of his conviction, as this Court held in Timo-

thy Leary v. United States, supra, and Francis v. Franklin, supra.

## II. THE DECISION BELOW, WHICH ALLOWED THE JURY TO CONVICT MR. RIVERA ON A CHARGE NOT MADE IN THE INDICTMENT, CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS

The First Circuit upheld Mr. Rivera's conviction on the March 30 distribution claim (count three) even though the trial judge erroneously instructed the jury that it could convict for possession with intent to distribute, a charge not included in the indictment, and the trial judge's only curative instruction was her discussion of distribution on the entirely different February 11 claim (count two). That decision squarely conflicts with this Court's governing precedent.

This Court in Stirone v. United States, 361 U.S. 212, 217 (1960), held that a defendant may not be tried on charges that are not in the indictment. Although

the conviction may have rested on a charge described in the indictment, the jury probably convicted defendant on a charge not included in the indictment.

Similarly, the Ninth Circuit in United States v. Solis, 841 F.2d 307 (9th Cir. 1988), reversed a conviction where a defendant, indicted on distribution of narcotics, was convicted by a jury that had received instructions both on possession with intent to distribute and on distribution. The Ninth Circuit declared that "when the jury was told it could convict for possession it was told it could convict for a crime not charged by the grand jury." 841 F.2d at 309.[5] As discussed in Part I

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[5] See also United States v. Mastelotto, 717 F.2d 1238 (9th Cir. 1983), where the Ninth Circuit reversed a conviction, citing Stirone for the principle that "the trial court is not free to alter the crime charged through an instruction that changes the conduct that must be found as a necessary element of the offense from the conduct set forth in the indictment, for we cannot be certain that the grand jury would have indicted on the altered basis." 717 F.2d

(Footnote continued)

above, the same thing happened in this case.

The First Circuit's decision affirming a conviction that may have been based on jury instructions describing a charge not made in the indictment, conflicts with this Court's interpretation of the Fifth Amendment's indictment clause in Stirone.

## III. THE DECISION BELOW, WHICH FOUND THAT A VIOLATION OF THE FIFTH AMENDMENT'S INDICTMENT CLAUSE COULD BE HARMLESS ERROR, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The First Circuit's holding that a violation of the indictment clause was "harmless error" conflicts with decisions of other circuits holding that a violation of the indictment clause can never be "harmless error."

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(Footnote 5 continued from previous page)
at 1248; United States v. Carroll, 582 F.2d 942 (5th Cir. 1978) (applying Stirone to reverse a conviction where instructions permitted conviction on similar but uncharged offense).

In United States v. Peel, 837 F.2d 975 (11th Cir. 1988), the Eleventh Circuit reached a contrary decision in a case in which the defendant's trial attorney had failed to object to jury instructions that altered the terms of the grand jury indictment. The Eleventh Circuit reversed the conviction, holding that "clearly appellant was denied his fundamental constitutional right under the Fifth Amendment to be tried and convicted only on the charges presented in the indictment returned by the grand jury.... An error of that constitutional magnitude cannot be deemed harmless." 837 F.2d at 980.

Other circuits have affirmed this principle that a violation of the indictment clause cannot be harmless error. In Glenn v. Dallman, 686 F.2d 418 (6th Cir. 1982), the Sixth Circuit reversed a conviction where the jury instructions had omitted an element of the charge made in the

indictment. Even assuming that the state had presented sufficient evidence so that the jury would have found the missing element, the Sixth Circuit refused to deem the error harmless.

Similarly, in United States v. Howard, 506 F.2d 1131 (2d Cir. 1974), the Second Circuit reversed a conviction where the jury instructions had omitted an element of the charge made in the indictment. Considering the government's contention that the defendant could not dispute the occurrence of the missing element, the Sixth Circuit stated: "While that may be substantially true, we do not think it harmless error for a jury to find a man guilty of a federal offense without even knowing what the elements of the offense are." 506 F.2d at 1133-4.[6]

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[6] See also United States v. King, 521 F.2d 61 (10th Cir. 1975) (regardless of the strength of the evidence, it is fundamental error to fail to instruct on the necessary elements of the charge named in the indictment).

Moreover, the above decisions of the Eleventh, Sixth and Second Circuits conflict not only with the First Circuit's decision in the present case, but also with the Seventh Circuit's decision in United States v. Kerley, 838 F.2d 932 (7th Cir. 1988), which found that failure to instruct on an element of the offense described in the indictment can be harmless.

## IV. THE FIRST CIRCUIT'S APPLICATION OF HARMLESS ERROR ANALYSIS TO PLAIN ERRORS CONFLICTS WITH DECISIONS OF THIS COURT

The First Circuit agreed that the trial judge committed plain error when she instructed the jury on possession with intent to distribute on the March 30 distribution claim (count three). Her subsequent clarification on the February 11 claim (count two) did not render the plain error on the March 30 claim harmless beyond a reasonable doubt.

This Court in United States v. Young, 470 U.S. 1 (1985), held that "plain error" constitutes only those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," Young, 470 U.S. at 15, citing United States v. Atkinson, 297 U.S. 157, 160 (1936).

Harmless error analysis was defined by this Court in Chapman v. State of California, 386 U.S. 18, reh. den. 386 U.S. 987 (1967), which held that a properly preserved federal constitutional error must be found harmless beyond a reasonable doubt before such an error can be declared harmless. The Supreme Court's plain error test defined in Young does not include a separate Chapman harmless error determination.

Nevertheless, the First Circuit found that an incomplete jury instruction on the wrong crime, possession with intent to distribute instead of the charged of-

fense of distribution, which seriously affected the fairness of Mr. Rivera's trial and resulted in a miscarriage of justice, could be rendered harmless beyond a reasonable doubt because of a subsequent clarification on the February 11 claim. The First Circuit's addition of the "harmless error" analysis is without precedent in this Court.

Moreover, the First Circuit's second analytical step is incorrect. An error that was found substantial enough to materially affect the rights of the accused cannot simultaneously be deemed trivial enough to be harmless beyond a reasonable doubt simply because of a confusing instruction on an entirely different count. Note, State v. Hutchinson, 10 Balt. Law Rev. 362, 368, n.38 (1981).

If the errors of the First Circuit were corrected, then Mr. Rivera's conviction on the March 30 distribution

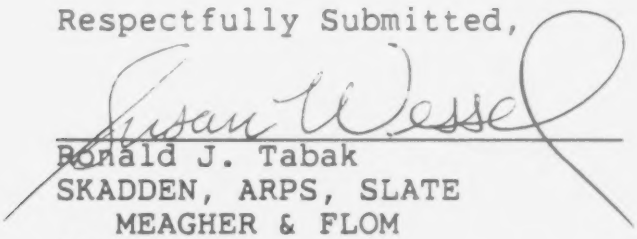
claim (count three) would be vacated upon remand.

## CONCLUSION

For all of the foregoing reasons this Petition For Writ Of Certiorari should be granted.

Dated: June 9, 1989

Respectfully Submitted,



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# APPENDIX

United States Court of Appeals
For the First Circuit

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No. 88-1398

UNITED STATES OF AMERICA,

Appellee,

v.

RAMON RIVERA,

Defendant, Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, U.S. District Judge]

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Before

Breyer, Aldrich and Selya,

Circuit Judges.

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George J. Skelly with whom Thomas J. Dougherty, by Appointment of the Court, Lori Weiner Lander and Skadden, Arps, Slate, Meagher & Flom were on brief for appellant. Deborah A. Ramirez, Assistant United States Attorney, with whom Frank L. McNamara, Jr., United States Attorney, was on brief for the United States.

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APRIL 10, 1989

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ALDRICH, Senior Circuit Judge.

As the result of an undercover investigation aimed at reaching higher-ups, defendant Ramon (Manny) Rivera was tried on three counts of a four count indictment, count one charging conspiracy with John H. Azulay and Martin A. Chutjian, and others presently unknown, until on or about March 31, 1987, to "possess with intent to distribute a quantity of cocaine" in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. § 2 (Aiding and Abetting), and count four, "acting in concert and in furtherance of [the count one conspiracy with Azulay and Chutjian] [to] knowingly and intentionally distribute 500 grams or more" of a mixture containing cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Aiding and Abetting). On the afternoon of the first day of its deliberations the jury reported that it had agreed on counts one and four, but was still debating count

three, and was willing to return and continue in the morning. The court asked the government if it would be content to drop count three if there were convictions on one and four. The government agreed. The defendant was not asked whether he agreed or not. Upon the jury's returning guilty verdicts on counts one and four, the following order was entered dismissing count three.

> This action is taken for the reason that Ramon Rivera has been convicted of Counts I and IV of the indictment and it is not in the interest of justice to further prosecute Count III of the indictment.

After Rivera was sentenced on counts one and four it was discovered that the indictments had been returned by a grand jury whose term had expired, and were invalid. At defendant's request the convictions were vacated. Defendant was re-indicted; count one being the same, except to add Ismael Narvez, also known as

"Freddy," as another named conspirator. Count three was the same as before, except to be renumbered count two, with count four, in the same terms as before, becoming count three. Defendant went to trial and was duly convicted on all three counts. On counts one and two he was sentenced to ten years each, and on count three, seven years, all to be served concurrently. In addition, he was sentenced to four years supervised release on counts two and three, with a special assessment of $50 on each count. With new counsel, he appeals.

Defendant asserts that double jeopardy barred count two. The invalidity of count three of the first indictment did not destroy defendant's right to claim double jeopardy thereunder. Benton v. Maryland, 395 U.S. 784, 797 (1969). We have no doubt that he had such a right. On the government's claim to re-prosecute, one need only ask what the court would have

said if counts one and four had not been vacated and the government had come back the next week and said it had decided to retry count three after all. It is no better off because counts one and four collapsed. The government made what turned out to be a poor concession, not a conditional one.

The government argues that, in effect, what occurred was a mistrial. We think this too favorable, but even were it correct, it was the type of mistrial that does not, in the absence of consent, permit reactivation. A mistrial declaration that is not consented to by the defendant must be required by "manifest necessity" or the "ends of public justice," or it is a bar to further prosecution. See Illinois v. Somerville, 410 U.S. 458, 468-71 (1973). There was no possible necessity here.

The more serious question is whether defendant waived the defense of

double jeopardy by not pleading it. Double jeopardy is a personal defense that can be waived. United States v. Broce, 109 S. Ct. 757 (1989); Ricketts v. Adamson, 483 U.S. 1 (1987). We note a number of cases in other circuits indicating it may be waived simply by not pleading it. E.g., Paul v. Henderson, 698 F.2d 589, 592 (2d Cir.) (citing cases from seven circuits), cert. denied, 464 U.S. 835 (1983). Most of those cases, however, are dicta, and we find none that persuasively addresses the principle that a waiver of a constitutional right must be "voluntary, knowing, [and] intelligent." United States v. Christian, 571 F.2d 64, 69 (1st Cir. 1978). There is no evidence here of knowing. Since it would be an absolute defense, plain error is clearly applicable.

The government argues that defendant's letting count two go to trial was a tactical choice. It says that the presence of count two required it to call Miller, a

government informant, as a witness, and that from defendant's standpoint he was the most vulnerable of the government witnesses, and might prove, net, to be an advantage to defendant. This is a thin reed. Just as we reject defendant's claim, post, that the presence of count two required him, the defendant, to take the stand, neither would the government have to call Miller. We do not accept the government's claim of conscious choice. The conviction on count two must be vacated.

As to counts one and three, defendant made no objections to the charge, but we are now inundated with complaints. We recognize, of course, that a defendant may assert plain error, but we realize, too, that plain error with respect to a matter readily remediable, if not a trap for the court (advertent or inadvertent), gives a defendant a free second bite at the cherry, and is to be narrowly limited. See

United States v. Griffin, 818 F.2d 97, 100 (1st Cir.), cert. denied, 108 S. Ct. 137 (1987). An error is not plain unless it sufficiently appears that it would likely have affected the outcome. See United States v. Young, 470 U.S. 1, 15 (1985). For this we must review the record.

Briefly, the facts that the jury could have found are these. On February 11, 1987, Drug Enforcement Agents Assarian and Alexander purchased one pound of cocaine from Martin Chutjian. Agent Alexander and an informant named Miller observed a man they identified as defendant Rivera deliver the cocaine to Chutjian. On March 30, 1987, Assarian and Alexander bought two kilograms of cocaine from Chutjian. After this transaction, they arrested Chutjian and asked him to contact his source of supply. Chutjian complied, and arranged a meeting at a restaurant. Subsequently, Alexander, Assarian, and Chutjian met de-

fendant at the restaurant and discussed with him the 1-pound purchase, and the 2-kilo purchase, in such terms that it could have been inferred that he had been the supplier, and made plans for a future 7-kilo purchase. Defendant was then arrested.

Unhappily, during its charge, the court used instructions furnished by the government addressed to offenses different from those in the indictment. It does not necessarily follow that defendant was harmed. As we said in United States v. Doherty, No. 87-1681, slip op. at 27 (1st Cir. Feb. 1, 1989),

> An erroneous instruction on an element of the offense can be harmless beyond a reasonable doubt, if, given the factual circumstances of the case, the jury could not have found the defendant guilty without making the proper factual finding as to that element.

Starting with count one, this count charged, and the court correctly quoted it,

a conspiracy "to possess cocaine with intent to distribute it." Later, however, the court spoke in terms of a conspiracy to distribute, and made no mention of possession. Defendant points out that these are distinct offenses. This, of course, is true. But how, as, indeed, the evidence in fact fully illustrates, can one conspire to distribute without contemplating possession with intent? The evidence of defendant's possession was inescapably of a piece with the distribution, and would either be rejected or accepted as a whole. Hence the jury was correctly told what the indictment charged, and later, in effect, what the government need show. Defendant was not harmed by the court's having spoken at one point in terms of distribution. Cf. United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987); United States v. Solis 841 F.2d 307 (9th Cir. 1988). We do not agree with defendant that an element of the govern-

ment's evidentiary burden was omitted, as in United States v. Ochs, 842 F.2d 515 (1st Cir. 1988). While Solis "makes clear [that] possession is not distribution," the reverse does not necessarily follow, and did not here.

An incipiently more substantial mix-up occurred on counts two and three -- the court charging that they were the same, except noting that as to count three there was the additional 500 gram requirement. But as to these counts the court incorrectly described the indictment, saying that it charged "possessing cocaine with intent to distribute," rather than the distribution itself. It then discussed the elements of possession with intent. Had matters stopped there, defendant would have had a serious complaint, but, fortunately for the government, they did not. The jury had difficulty and later sought clarification as to whether it had to find that defendant

was present when the February 11 distribution occurred. In response, while the court repeated that defendant was charged with possession with intent to distribute, it then specifically stated that, whether present or not, the jury must find that he participated in the distribution. Whether the jury's question had been precipitated by reading the indictment, which had gone to the jury room, does not, of course, appear, but that proof of participation in the actual distribution was part of the government's burden was the court's last, and positive, requirement, that could not have been misunderstood.

> The Government's theory was that he was the person, and the evidence that the Government put forward, it argued, suggests to you that he was the person who appeared at the Ground Round on February 11th and transferred a package to either Mr. Miller or Mr. Chutjian, I can't remember which, and that the package contained cocaine, and that that was the same package that is now upstairs in the jury room. That was the Government's theory.

> What the Government, as I say, has to prove is that he participated in the distribution of cocaine on that day.
>
> The Government also suggested to you, although, this was its primary theory that he was there, that he acknowledged participating in the distribution of cocaine on that day as well as on the 30th, in the conversations at the Hong Kong Restaurant on March 30.
>
> Whether he did or not is for you to find. I think the evidence is thin of the conversations that would suggest that he distributed. But you will have to determine whether he, if you find that he wasn't there, whether he, in fact, participated in the distribution of cocaine on February 11th.
>
> If you find that he did participate in the distribution of cocaine, knowingly and intentionally, then you may find him guilty of count 2.*

In addition, the court, in charging with respect to aiding and abetting, again emphasized the government's burden as to distribution.

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* As we said before, the court's instructions, further, tied counts two and three together.

Now, note that the indictment charges that defendant and others acting in concert, i.e., together, were distributing cocaine. You will note when you look at the indictment that it refers not only to Title 21, but also to Title 18, Section 2, which is another statute that says that somebody who aids and abets someone who is carrying out a criminal offense is as guilty as the person who does it.

It says, in general, that a person may be found guilty, even though he does not himself do every act that constitutes a criminal offense, if he either assists somebody else or gets somebody else to commit it. So if a person is an accomplice, if he willfully with an intent to violate the law, participates in the commission of a crime, he may be found guilty as an aider and abettor.

So if you find beyond a reasonable doubt that the defendant in some way associated himself with the illegal distribution of cocaine with sales to the agents as something that he wanted to bring about, the Government doesn't have to prove that he was involved in every stage of this transaction. It is enough if the Government proves that he participated at some stage, provided it also shows that he did it with knowledge of the results to be

> achieved and with the intent to bring about that result. (Emphasis supplied.)

This was precisely correct.

It was also what the evidence showed. Defendant quotes our opinion in United States v. Campa, 679 F.2d 1006, 1010 (1st Cir. 1982) ("the government must prove some affirmative participation by the aider and abettor"), and claims the conviction cannot stand because the evidence presented to the jury "was devoid of any concrete evidence of active participation by [defendant]." There was amply such. Agent Assarian testified that when he requested Chutjian to contact the source of the cocaine, Chutjian dialed a series of numbers consistent with contacting a telephone message "beeper;" that Chutjian engaged in a conversation with someone he identified as "Manny" with whom he arranged to meet at the Hong Kong restaurant and whom he requested to bring a "piece" of cocaine for

himself; that defendant was at the Hong Kong restaurant at the appointed time; had in his possession a "beeper" displaying the telephone number of the pay phone from which Chutjian had placed his call; had a "piece" of cocaine in the car he was driving, and, Agent Assarian testified, made reference to the quantity, quality, and origin of the cocaine that Assarian had just received and promised to deliver cocaine of the same quality in the future. Clearly the jury must infer that defendant participated in the distribution of the cocaine delivered to Assarian if it believed Assarian at all.

On the assumption that count two was barred by double jeopardy, defendant advances a number of reasons why presenting it to the jury improperly prejudiced him with respect to count three. All, however, fail. In the first place, quite apart from the crime of the substantive offense, a

sale on February 11 was an event properly shown in connection with the count one conspiracy. The termination of former count three, now count two, without decision, was not a finding that defendant had not participated in that sale; it merely meant he could no longer be convicted for the substantive offense. Conspiracy and the substantive crime are two separate offenses, for which a defendant can be separately convicted. Iannelli v. United States, 420 U.S. 770, 777-78 (1975). There is no reason to hold that the February 11 activity could not still be considered in connection with the former.

Nor do we accept the contention that the inclusion of count two was more broadly prejudicial because it required defendant to take the stand to testify to an alibi, the subsequent refutation of which may have carried over to hurt him in respect to count three. Defendant did not

take the stand before; it was his voluntary choice to change his tactics. Moreover, he did not restrict his testimony to count two; he also testified to an alibi as to count three. He is not now entitled to the best of both worlds by claiming plain error affecting count three.

There is one matter as to which defendant did save his rights, the introduction of testimony of a Shawn Proulx that Proulx regularly purchased cocaine from a cousin of defendant's, Freddy (of count one), and, when the cousin was unavailable, from defendant. The court determined that the evidence showed "both an opportunity to get [cocaine] and intent to distribute it . . . [and] a plan to distribute," and admitted it under Fed. R. Evid. 404(b). Defendant claims the government had no need to prove either of these issues because they were not disputed, but we know of no concession. Cf. United States v. Renteria,

625 F.2d 1279, 1282 (5th Cir. 1980) (evidence of uncharged cocaine possession admissible in conspiracy case "although in the end the defense might choose not to contest the issue of intent"). Further, defendant blows hot and cold. He argues that proof of small sales was "not particularly probative" of the ability to acquire large quantities, and at the same time argues prejudice because "the jury may have believed that the charged offenses were nothing more than Mr. Rivera doing what he always did. "It might have been wiser not to go into the Proulx items, and if the base had been close, possibly they might have given us pause. However, if we accept defendant's argument that small sales were not particularly probative of big dealing (one and four pounds, with plans for much larger amounts), by the same token they were not particularly harmful. And, in fact, it already appeared that defendant

occasionally made small sales, the evidence showing a "piece" in his car in response to Chutjian's request on March 30. And even were we to find the admission error, we would not find it, on the record as a whole, prejudicial to a fair trial.

Affirmed in part; vacated in part.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 88-1398

UNITED STATES,
Appellee,

v.

RAMON RIVERA,
Defendant, Appellant.

**JUDGMENT**

Entered April 10, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed as to all Counts with the exception of Count Two only. The verdict of the jury as to Count Two only is set aside and the judgment of the district court only as to Count Two is vacated in accordance with the opinion filed this day.

By the Court:

**UNITED STATES DISTRICT COURT**

**_____ District Of Massachusetts**

UNITED STATES OF AMERICA

V. **JUDGEMENT IN A CRIMINAL CASE**

RAMON RIVERA Case Number: CR 87-383-Z

(Name and Address of Defendant) Stephen A. Lechter, Esq.
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[/__/ guilty /__/ nolo contendere] as to count(s) _____, and

[/X/ not guilty as to count(s) 1, 2, 3

THERE WAS A:

[/X/ finding /__/ verdict] of guilty as to count(s) 1, 2, 3

THERE WAS A:

[/__/ finding /__/ verdict] of guilty as to count(s) _____

/__/ judgment of acquittal as to count(s) ___
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: knowingly and intentionally conspiring to commit an offense against the United States, in violation of Title 21, U.S. Code, Sec. 846 (Count 1); and of knowingly and intentionally distributing a quantity of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, U.S. Code, Sec. 841 (a)(1) and Title 18 U.S. Code, Sec. 2 (Count 2); and of knowingly and intentionally distributing 500 grams or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, U.S. Code, Sec. 841(a)(1) and 18 U.S. Code, Sec.2 (Count 3).

IT IS THE JUDGMENT OF THIS COURT THAT:

The defendant is sentenced to the custody of the Attorney General for a period of imprisonment of ten (10) years on Count 1, ten (10) years on Count 2, and seven (7) years on Count 3, said sentences to be served concurrently with each other. A four (4) year period of supervised release is also imposed on Counts 2 and 3, to be served concurrently.

## CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours:
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence:
(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $150.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1, 2, and 3 as follows:

$50 on each count.

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

/X/ The Court orders commitment to the custody of the Attorney General and recommends:

March 17, 1988
Date of Imposition of Sentence

_____
Signature of Judicial Officer

U.S. District Judge
Name and Title of Judicial Officer

March 18, 1988
Date

**RETURN**

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to
Date
_____ at

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal